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No. 07-684

IN THE

Supreme Court of the United States

LIBERTY ELECTRIC POWER, LLC,

Petitioner,

v.

NATIONAL ENERGY & GAS TRANSMISSION, INC. and NEGT ENERGY TRADING POWER, L.P.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a creditor of a chapter 11 debtor can defeat Congress's proscription against allowance of claims for unmatured interest, expressly stated in the plain text section 502(b)(2) of the Bankruptcy Code, by allocating a payment from a non-debtor guarantor first to interest, then to principal, and then characterizing its claim as a claim for principal in order to collect against a bankrupt primary obligor.

CORPORATE DISCLOSURE STATEMENT

Respondent National Energy & Gas Transmission, Inc. (f/k/a PG&E National Energy Group) has no parent, is not a publicly held corporation, and no publicly held entity owns 10% or more of its stock.

Respondent NEGT Energy Trading Power, L.P. (f/k/a PG&E Energy Trading Power, L.P.) has no parent, is not a publicly held corporation, and no publicly held entity owns 10% or more of its stock.

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PRELIMINARY STATEMENT

This matter arises from the chapter 11 bankruptcy cases of respondents National Energy & Gas Transmission, Inc. ("NEGT") and NEGT Energy Trading Power, L.P. ("ET Power") and others (collectively, the "Debtors"). Petitioner Liberty Electric Power LLC ("Liberty") sought to recover from the Debtors' estates money it claimed to be owed in connection with an arbitration award ("Award") obtained after the bankruptcy was filed and after Liberty collected the full principal amount of the Award from ET Power's non-debtor guarantor. In the decision below, a majority of a Fourth Circuit panel recognized that, although Liberty characterized its general unsecured claim against ET Power as one for principal, Liberty's claim was actually an unsecured claim for unmatured interest (*i.e.*, interest accrued after the bankruptcy petition was filed), which the plain text of section 502(b)(2) of the Bankruptcy Code expressly disallows. 11 U.S.C. § 502(b)(2).

There is no warrant for certiorari review of the decision below. First, there is no circuit split on the only issue presented here – whether section 502(b)(2) bars Liberty's unsecured claim for unmatured interest, notwithstanding Liberty's characterization of the claim as one for principal. No other circuit court has decided the issue in this context, much less issued a conflicting decision. The majority's analysis fully comports with that routinely applied by other courts in considering whether an unsecured claim is one for unmatured interest that must be disallowed under section 502(b)(2), and Liberty cites nothing to the

contrary. The majority's analysis is also consistent with and supported by decisions construing other Bankruptcy Code provisions; in particular, decisions applying the analogous section 502(b)(6).

There also is no conflict with any of the Court's precedents concerning the relationship between state law and federal bankruptcy law. It is settled that federal law governs the question whether to allow interest on claims against a debtor's estate. So too, the majority's section 502(b)(2) analysis is entirely consistent with this Court's precedents concerning the proper construction of Bankruptcy Code provisions – *i.e.*, according to the statute's plain text and with due regard for the fundamental policies served by the statute and the Code, as well as the statute's history and relationship to other Code provisions.

Given that no other circuit court has addressed the question decided below, and the absence of a conflict with any decision of this Court, further development of the issue in the lower courts is warranted and certiorari review is premature.

Critically, the circuit split alleged by Liberty concerns a purported disagreement among the lower courts concerning *completely different questions* from the one presented here – application of section 510(c) of the Bankruptcy Code and issues of equitable subordination and disallowance. These issues are irrelevant to the question decided by the Fourth Circuit, and were neither briefed nor decided below. To the extent it applied equitable principles in denying Liberty's claim for unmatured interest, the majority correctly did so, consistent with the decisions of other

circuit courts and this Court, to enforce section 502(b)(2)'s intent and plain meaning.

Finally, the decision below presents no issue of extraordinary public importance warranting this Court's intervention. There is no basis for the allegations of Liberty and its *Amicus* concerning, *inter alia*, the purported catastrophic effects of the decision on commercial expectations and the credit markets. The majority expressly confirmed Liberty's state-law rights; there can be no dispute that payment of Liberty's claim would have reduced the funds available for distribution to other creditors; and the only parties affected by the decision are the parties to this case and the Debtors' other creditors.

The Court should deny Liberty's petition.

STATEMENT OF THE CASE

A. Background

In April 2000, Liberty entered into an agreement ("Agreement") with ET Power that gave ET Power the right to purchase energy from Liberty in exchange for a monthly capacity payment. Pet. App. 2a-3a, 26a. Liberty procured limited guarantees of payment from NEGT, an indirect parent of ET Power, and Gas Transmission Northwest Corporation ("GTN"), an NEGT subsidiary, in which both parties guaranteed ET Power's obligations under the Agreement. *Id.* 3a. The guarantees were subject to a $140 million cap on potential liability, *id.*, and provided that any payments made on account of one

guarantee would apply to reduce the maximum exposure under the other guarantee, *id.* 30a-32a & n.5.

On July 8, 2003 (the "Petition Date"), NEGT, ET Power, and others filed chapter 11 petitions, *see* Pet. App. 3a, and the cases were procedurally consolidated. On the Petition Date, the Debtors filed a motion to reject the Agreement, *see* 11 U.S.C. § 365(a), which was granted. *Id.* 4a.[1] Liberty sought rejection damages and approximately $5.4 million in unpaid invoices. *Id.* 4a, 27a.[2] An arbitration panel awarded Liberty $140 million in rejection damages plus interest that accrued after the Petition Date, which totaled $17 million. *Id.* & 5a n.3.

During the arbitration, NEGT and certain non-debtor subsidiaries entered into an agreement to sell all of the issued and outstanding shares of non-debtor GTN. Pet. App. 4a. The bankruptcy court approved the sale. Under the terms of the sale agreements, the face amount of the GTN guarantee ($140 million) was reserved in escrow and held back from the purchase price, and any liability of GTN to Liberty on account of the GTN guarantee would be paid directly from the escrow account, *see* Pet. App. 5a, 28a & n.3; with any remaining balance released

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[1] 11 U.S.C. § 365(a) provides, in pertinent part, that chapter 11 debtors, with the bankruptcy court's approval, "may assume or reject any executory contract or unexpired lease of the debtor."

[2] 11 U.S.C. § 365(g) provides, in pertinent part, that "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease."

to NEGT, *see* Fourth Circuit Joint Appendix ("JA") 174. After the arbitrators decided in Liberty's favor, the parties agreed that Liberty would receive immediate payment of the escrow amount. Pet. App. 4a-5a, 28a & n.3. Accordingly, Liberty was paid $140 million in full and final satisfaction of the GTN guarantee and, by its terms, the NEGT guarantee. *Id.*

Liberty continued to assert claims against NEGT and ET Power for $140 million each, arguing that NEGT and ET Power remained jointly and severally liable, and that Liberty therefore could continue to assert the full amount of the Award against both Debtors. Pet. App. 5a, 29a. Liberty acknowledged that it could collect at most $17 million (plus outstanding invoices), since it was entitled to no more than one full satisfaction of the Award from all sources. *Id.* 5a. Liberty contended that it could allocate any funds received under the GTN guarantee to post-petition interest and collection costs before applying any portion of those funds to principal. *Id.* 29a.

The Debtors objected to Liberty's proofs of claim against NEGT and ET Power,[3] *see* Pet. App. 6a, 27a,

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[3] When a debtor commences a bankruptcy case, a bankruptcy estate is formed, comprising all the debtor's interests in property, including any such interest acquired thereafter. 11 U.S.C. § 541(a). Creditors' rights to payment against the debtor constitute "claims" against the estate. 11 U.S.C. §§ 101(5), 502(b). Creditors holding pre-petition claims may file a "proof of claim" with the bankruptcy court. 11 U.S.C. §§ 101(10), 501(a); FED.

arguing, *inter alia*, that because Liberty received full satisfaction of its rejection damages from GTN, the $17 million Liberty sought necessarily constituted post-petition interest that must be disallowed under the express terms of 11 U.S.C. § 502(b)(2), *id.*, 29a. They also argued that Liberty should not be entitled to file a $140 million claim against ET Power and NEGT because the value of the claim did not accurately reflect the judgment Liberty could legally obtain against the Debtors. *Id.*

B. The Decisions Below

Noting its belief that the issue presented was one of "novel impression," Pet. App. 33a, the bankruptcy court concluded that: (i) Liberty could apply funds received under the GTN guarantee first to post-petition interest and then assert a claim against ET Power for the entire principal amount of the Award; and (ii) Liberty was not entitled to costs and fees. *Id.* 37a. The bankruptcy court's order allowed Liberty's unsecured claim against ET Power, limiting the maximum distribution on account of such claim to $22 million (the arbitration judgment amount, less the $140 million payment from GTN, plus the

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R. BANKR. P. 3001, 3002. A filed claim is "allowed" automatically if no party in interest objects. 11 U.S.C. § 502(a). If an objection is filed, the court must resolve it and either allow or disallow the claim under section 502(b), which directs that, if an objection to a claim has been filed, the court "shall determine the amount of such claim . . . as of the date of the filing of the petition, except to the extent that [one of the exceptions to allowance listed in section 502(b) applies]." 11 U.S.C. § 502(b).

amount of outstanding invoices), and expunged Liberty's claim against NEGT. *Id.* 23a.

On appeal to the district court, the Debtors argued, *inter alia*, that the bankruptcy court had incorrectly interpreted section 502(b)(2) and erred in allowing a claim against ET Power for amounts equal to post-petition interest on the Award. The district court affirmed the bankruptcy court's order on essentially the same grounds. Pet. App. 20a; JA 377-84.

On further appeal, the Fourth Circuit reversed in a decision that drew three opinions, with the majority concluding that Liberty's unsecured claim was a claim for post-petition interest on the Award that must be disallowed under section 502(b)(2), and that Liberty could not evade this proscription by characterizing the claim as one for principal. Pet. App. 10a. After first concluding that, despite language in the guarantee purporting to make GTN a co-obligor, GTN was a surety for ET Power, and that the "value of ET Power's debt to Liberty under state law [wa]s not reduced by the $140 million received from GTN," the majority turned to the "more fundamental question." Pet. App. 7a-8a. The majority began with the text of section 502(b)(2) and the central bankruptcy policies informing the statute's application:

> The purpose of this section is twofold: (1) the avoidance of unfairness among competing creditors, and (2) the avoidance of administrative inconvenience. As with all sections of the Code, § 502(b)(2) exists to guide the court in the administration of a bankruptcy estate so as to bring about a ratable distribution of as-

> sets among the bankrupt's creditors. Indeed, § 502(b)(2) itself reflects the equitable nature of the Code, and our application of its bar on post-petition interest is to be guided by principles of equity. Thus, in applying § 502(b)(2), we have a duty to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.

Pet. App. 8a-9a (internal quotation marks and citation omitted).

Applying these principles, the majority concluded that Liberty already had received the full value of the debt it was owed by ET Power ($140 million) on the Petition Date and that "§ 502(b)(2) prevents Liberty from collecting the additional $17 million it seeks despite Liberty's classification of that amount as principal." Pet. App. 10a. The majority reasoned:

> On the date the debtors filed their bankruptcy petition, the Agreement was effectively rejected and Liberty sustained damages, although the value of the damages was then unknown and disputed. Subsequently, through arbitration, Liberty's damages were determined to be $140 million. Thus, Liberty's damages and ET Power's debt to Liberty on the petition date was $140 million, and by the terms of § 502(b)(2), Liberty could not collect in bankruptcy any additional amounts added due to the accrual of interest. *Nicholas v. United States*, 384 U.S. 678, 682 (1966) ("[T]he accumulation of interest on claims against a

> bankrupt estate is suspended as of the date the petition in bankruptcy is filed."). This result is not altered simply because Liberty holds a guarantee from a non-debtor third party. Accordingly, the arbitration panel's award of interest on the $140 million in damages, while perhaps appropriate under the Agreement and as a matter of nonbankruptcy law, is not collectable from the debtors in bankruptcy by virtue of § 502(b)(2).

Pet. App. 10a.

The majority explained that "[t]he § 502(b)(2) bar to collection of interest is not overcome by Liberty's classification of the $17 million it now seeks as principal," and that "[r]egardless of how Liberty classifies GTN's payment for its own purposes, we must sift the circumstances surrounding the claim to determine the reality of the transaction for purposes of the bankruptcy proceeding." Pet. App. 11a (internal quotation marks and citation omitted). The majority held that "[b]ecause ET Power's debt was capped at $140 million by the filing of the bankruptcy petition and because the debt was increased only by the accrual of interest pursuant to the arbitration award, we view Liberty's claim for an additional $17 million as disallowed post-petition interest no matter how Liberty chooses to classify it." *Id.*

The majority rejected Liberty's arguments that the court "must accept its classification of GTN's payment as interest rather than as principal because bankruptcy proceedings cannot affect the liability of a non-debtor on a debt," and that barring Liberty

from collecting the additional $17 million from the estate "will essentially relieve GTN of its obligation to pay interest." Pet. App. 11a n.5. The majority emphasized that its decision did not abrogate Liberty's state-law rights against GTN or GTN's liability to Liberty:

> Liberty is free to classify GTN's payment as interest or to pursue collection from GTN at any time. Any limitation of Liberty's right to recover from GTN the full amount it is owed is due to the terms of GTN's guarantee or to non-bankruptcy law, not to our decision here. We merely hold that Liberty may not affect the rights of a party in bankruptcy by its classification of a payment received from a non-debtor guarantor.

Id.

A contrary result, the majority explained, would permit creditors to evade section 502(b)(2) simply by classifying a payment on a debt from a non-debtor guarantor as "nonprincipal, thus preserving the full value of the principal for collection in bankruptcy," and, therefore, it was necessary for the court to determine whether the claim "really constitutes post-petition interest disguised as unpaid principal." Pet. App. 11a-12a. The majority reasoned that if "Liberty had classified GTN's payment of $140 million not as a payment on the debt but as consideration received in return for a covenant not to sue, we would certainly look behind the transaction and would not allow collection as principal of the full $140 million." *Id.* So too, the court must "look behind Liberty's

claim here to find that the claim really constitutes post-petition interest disguised as unpaid principal." *Id.*

The majority further noted that its conclusion is supported by 11 U.S.C. §§ 506(b) and 726(a)(5), which allow recovery of post-petition interest where the creditor is oversecured or the debtor is solvent, respectively. In such cases, allowance of post-petition interest does not result in administrative inconvenience or unfairness to creditors in contravention of the critical bankruptcy policies served by section 502(b)(2). Pet. App. 12a. In contrast, "allowing, Liberty to collect the additional amount it seeks *will* have an impact on ET Power's creditors: namely, the loss of $17 million from the estate which would otherwise be available for distribution." *Id.*

Judge Wilson's concurrence stated the question presented, and his view, as follows:

> Does Liberty's contractual right with GTN, a third party, to allocate principal and interest, that is, to call payments from that guarantor what it wants to call them, preclude the Bankruptcy Court from calling those payments what they are vis-à-vis the bankrupt debtor. That is, can Liberty allocate its way around § 502(b)(2)'s disallowance of unmatured interest. In my view to do so is to simply call a rose by another name.

Pet. App. 13a.

Thus, under the majority and concurring opinions, post-petition interest can accrue against a non-

debtor, but section 502(b)(2) disallows a claim for post-petition interest against the estate. Pet. App. 12a-13a.

In dissent, Judge Duncan stated: "Because neither bankruptcy law nor the contract governing Liberty's relationship with the non-debtor guarantor GTN limits Liberty's right to allocate its recovery from GTN in any manner it wishes, I would affirm." Pet. App. 18a.

Liberty's Petition for Rehearing and Rehearing En Banc was subsequently denied. Pet. App. 39a.

REASONS FOR DENYING THE PETITION

The decision below presents no occasion for certiorari review. First, it does not conflict with any other circuit-court decision. The only issue presented by the decision below is whether section 502(b)(2) bars Liberty's unsecured claim for unmatured interest, notwithstanding Liberty's characterization of the claim as one for principal. No other circuit court has decided this issue, much less decided it in conflict with the majority below. Moreover, courts considering whether an unsecured claim is one for unmatured interest routinely focus on the substance of the claim, not its form, and apply common criteria in analyzing whether allowance or disallowance of the claim under section 502(b)(2) would unfairly prejudice other creditors, provide a windfall to the debtor, or otherwise contravene bankruptcy policy. The majority's approach fully comports with that employed by other courts in applying section 502(b)(2), and Liberty cites nothing to the contrary. The majority's

analysis also is consistent with, and supported by, decisions construing other Bankruptcy Code provisions; in particular, cases applying section 502(b)(6).

Second, the majority's statutory analysis does not conflict with *Travelers Cas. & Surety Co. v. Pac. Gas. & Elec. Co.*, 127 S. Ct. 1199 (2007), or with any of the Court's decisions concerning the interplay between state law and federal bankruptcy law. Federal law governs the question whether to allow interest on claims against a debtor's bankruptcy estate. In *Travelers*, no section 502(b) provision barred Travelers' unsecured claim for attorneys' fees. Here, the majority determined that Liberty's unsecured claim was not a claim for principal, but rather an unsecured claim for unmatured interest, which is expressly barred by section 502(b)(2)'s plain text. The majority's decision also is entirely consistent with this Court's precedents concerning the proper construction of bankruptcy statutes, in accordance with the statute's plain text, with due regard for the fundamental policies served by the statute and the Bankruptcy Code, as well as the statute's history and relationship with other Code provisions.

Third, further development in the lower courts is warranted, and certiorari review is premature, given the absence of a conflict with this Court's precedents and that no other circuit court has addressed the question decided below – whether a creditor of a bankrupt debtor can defeat section 502(b)(2)'s proscription against allowance of claims for unmatured interest by allocating a payment from a non-debtor guarantor first to interest, then to principal, and

then characterizing its claim as one for principal in order to collect against a bankrupt primary obligor.

Fourth, the circuit split alleged by Liberty concerns a claimed disagreement concerning completely different questions – involving section 510(c) of the Bankruptcy Code and issues of equitable subordination and disallowance – that are irrelevant to the question decided by the Fourth Circuit and that were neither briefed nor decided below. Nor is the majority's decision an indiscriminate invocation of equitable principles unmoored from any statutory text, as Liberty contends. To the extent it applied equitable principles in denying Liberty's claim for unmatured interest, the majority properly considered fundamental policies underlying the Bankruptcy Code and specifically informing application of section 502(b)(2) and, consistent with the decisions of this and other courts, did so to enforce that statute's express proscription against allowing unsecured claims for unmatured interest.

Finally, the decision below presents no issue of extraordinary public importance warranting this Court's intervention. The allegations of Liberty and its *Amicus* concerning the purportedly ruinous effects of the majority's decision on commercial expectations and the credit markets are unfounded. The majority simply applied section 502(b)(2) as written, with proper regard for the policies and purposes the statute and the Bankruptcy Code were enacted to serve, and the only parties affected are the parties to this case and the Debtors' other creditors. Importantly,

the majority expressly confirmed that Liberty is free to pursue its state-law rights against GTN.

For these reasons, Liberty's petition should be denied.

A. The Majority's Decision Creates No Circuit Split Concerning Application Of Section 502(b)(2).

Liberty contends that the majority's decision "creates a three-way conflict among the circuits regarding when, if ever, a federal court may rely on equitable principles to disallow an otherwise valid claim in bankruptcy." Pet. 10. But the only question presented to and decided by the Fourth Circuit is whether section 502(b)(2) bars Liberty's unsecured claim for post-petition interest, notwithstanding Liberty's characterization of the claim as one for principal. No other circuit court has addressed this issue in the context of a creditor's allocation of payment from a non-debtor-guarantor, much less decided it in conflict with the majority's decision. No circuit split justifies certiorari review of the decision below.

1. The majority's analysis comports with that employed by other courts in considering whether an unsecured claim includes unmatured interest.

In construing and applying section 502(b)(2), courts routinely employ a "few common principles," examining the context of the particular transaction; the statute's history and purpose; its relationship to other Bankruptcy Code provisions; the policies underlying the Code; and the equities involved. *E.g.*, *In*

re Thrifty Oil, 322 F.3d 1039, 1047-48 (9th Cir. 2003) (collecting cases). The majority's decision fully comports with this analysis.

In *Thrifty Oil*, the court considered whether termination damages under an interest-rate swap contract constituted unmatured interest. After citing section 502(b)(2)'s text, the court explained that "[f]ederal law, not state law, governs a creditor's entitlement to post-petition interest on a valid prepetition claim." 322 F.3d at 1046 (citing *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 163 (1946)). The court then explained the origins of the rule "curtailing" the accrual of post-petition interest on amounts owed by debtors, *id.* at 1046-47 (citing *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911)), and discussed the rule's purpose:

> [T]he Bankruptcy Code maintains the rule to achieve fairness and administrative efficiency in bankruptcy cases. The most significant reasons for the rule include: (1) because a bankruptcy suspends a debtor's ability to pay its debts, requiring payment of post-petition interest penalizes the debtor for something over which it has no control; (2) denying post-petition interest saves the bankruptcy estate the inconvenience of continuously recalculating the amount due each creditor; and most importantly, (3) denying post-petition interest ensures that no party realizes a gain or suffers a loss due to the delays inherent in liquidation and distribution of the estate.

322 F.2d at 1047 (citing *Vanston*, 329 U.S. at 162-63; *In re Fesco Plastics Corp.*, 996 F.2d 152, 155 (7th Cir. 1993)); *see Gamble v. Wimberly*, 44 F.2d 329, 333 (1930) (rejecting *secured* creditor's application of proceeds from sale of collateral first to post-petition interest then to principal, stating that "proceeds from collateral held by a secured debtor must be applied to the liquidation of the debt with interest to the date of the petition only, and cannot be applied to interest accruing since that time").

Noting the "infinite variety of transactions that may trigger an unmatured interest objection," the *Thrifty* Court enumerated the following "common principles" applied in determining whether a claim includes unmatured interest disallowed by section 502(b)(2). 322 F.3d at 1047. First, "courts generally focus on the substance of the claim, not its form and may rely on evidence outside the parties' agreement." *Id.* (citing cases). Second, "[w]here the specific characteristics of a transaction create uncertainty as to whether a claim includes unmatured interest, federal courts do not base their decisions on economic theories of interest. Instead, they evaluate the transaction in light of the principles that underlie Section 502(b)(2) and the policies that flow throughout the Bankruptcy Code." *Id.* (citing *Vanston*, 329 U.S. at 165); *see id.* at 1050 ("the resolution of this issue does not turn on economic theories of interest, but on equitable principles and bankruptcy policy"). Such cases "often turn on whether allowance or disallowance will contravene bankruptcy policy, unfairly prejudice other creditors or provide a windfall to the

debtor." *Id.* at 1047-48 (citing *Bruning v. United States*, 376 U.S. 358, 363 (1964), and decisions within the Second, Fifth, Eighth, Ninth, and Tenth Circuits).

The courts in these cases, and the *Thrifty* Court itself, reached a different conclusion from that of the majority below. Critically, however, these courts applied section 502(b)(2) in the same way the majority did – *i.e.*, focusing on "the reality of the transaction for purposes of the bankruptcy proceeding," Pet. App. 11a-12a, and with proper regard for the duty of courts to apply section 502(b)(2) consistent with the "equitable nature" of the statute and the Code, *id.* 9a.

The Seventh Circuit applied a similar analysis in *Fesco*, rehearsing the history of the proscription against recovery of post-petition interest and the policies it serves, and rejecting creditors' "attempt to sidestep § 502(b)(2)'s bar on post-petition interest by noting that it only refers to interest on *claims*, while they are seeking interest on their tardy 40% *distributions*." 996 F.2d at 155-56. The court concluded:

> This semantic sleight-of-hand is unpersuasive. Although it is true that the . . . creditors only want interest for the period between the earlier distribution and the time they received their distributions, rather than from the date of the petition, *the fact is that they are requesting interest that would have had to accrue after the petition was filed*. The cases and § 502(b)(2), however, make it clear that interest stops accruing when the petition is filed.

Id. at 156 (emphasis supplied) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 246 (1989); 2 COLLIER ON BANKRUPTCY, ¶ 502.02[2] at 502-30 (Lawrence P. King ed., 15th ed. 1993)). *See Brown v. Sayyah (In re ICH Corp.)*, 230 B.R. 88, 94 (N.D. Tex. 1999) ("Undersecured creditors are not permitted to recover any part of a debt that represents unaccrued interest as of the filing of the bankruptcy petition, even if the parties have tried to disguise the interest as principal."); *cf. United States v. Energy Res. Co.*, 495 U.S. 545, 551 (1990) (bankruptcy court could order IRS to treat tax payments by a chapter 11 debtor corporation as trust fund payments, rather than non-trust liabilities, notwithstanding that this could result in IRS not recovering the full amount of debtor's tax liabilities). Liberty cites *no* decision holding that courts must accept uncritically an unsecured creditor's characterization of its claim in applying section 502(b)(2).

To similar effect in the guarantee context is *Aetna Bus. Credit, Inc. v. Hart Ski Mfg. Co. (In re Hart Ski Mfg. Co.)*, 7 B.R. 465 (Bankr. D. Minn. 1980). There, the debtor purchased inventory from a supplier via letters of credit, and its obligation to the issuing bank was guaranteed by non-debtor Aetna, which held a first lien on the debtor's property. *Id.* at 466-67. After the debtor filed for bankruptcy, the creditor-bank demanded payment on the letters of credit from the debtor and Aetna. *Id.* at 467. The court disallowed any claim for post-petition interest, reasoning that because "Aetna's obligation is limited to the obligation owed by [the debtor to the bank] . . .

[and the debtor] could not owe [the bank] interest, therefore, Aetna is not liable for such interest." *Id.* at 469. Because Aetna's indemnification claim under the guarantee was fully collateralized, *id.* at 468, any recovery against Aetna would have diminished the debtor's estate by a like amount. The court concluded that to allow the bank to recover post-petition interest from Aetna would have impermissibly "allowed [the bank] to accomplish indirectly what it could not accomplish directly under § 502(b)(2)." *Id.* at 469.

2. The majority's decision comports with the Bankruptcy Code as a whole and courts' application of related Code provisions.

Recognizing that the Bankruptcy Code was intended to function as a coherent regulatory scheme, the Court has directed that its provisions should be construed together, taking into account the relationships among the provisions. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 369-72 (1988) (construing sections 361, 362 and 506 and observing that "[s]tatutory construction . . . is a holistic endeavor"); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law") (internal quotations marks and citations omitted). As the Court explained in *Timbers*, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that

makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." 484 U.S. at 371 (citations omitted).

There appears to be no other circuit-court decision concerning the effect of a creditor's recovery against a third-party on an underlying claim against a debtor that is otherwise limited by section 502(b)(2). The majority's decision, however, is entirely consistent with decisions applying other Code provisions; in particular, other claim-limiting provisions of section 502(b), which exist for the protection of debtors who avail themselves of the benefits and burdens of bankruptcy. *See, e.g., Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). For example, the majority's holding is supported by analogous decisions regarding the effect of third-party recoveries on claims limited by section 502(b), which caps a landlord's claim in bankruptcy for damages resulting from termination of an unexpired lease.[4] At least three appellate courts have required creditors receiving recoveries from third-parties to apply such proceeds to the *capped* portion

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[4] Section 502(b)(6) provides, in pertinent part, that a "claim of a lessor for damages resulting from the termination of a lease of real property" is disallowed if "such claim exceeds- (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of- (i) the date of the filing of the petition; and (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates." 11 U.S.C. § 502(b)(6).

of their claims, which is the same result mandated by the majority's decision here. *See AMB Prop., L.P. v. Official Creditors for the Estate of AB Liquidating Corp. (In re AB Liquidating Corp.)*, 416 F.3d 961, 965 (9th Cir. 2005); *Redback Networks, Inc. v. Mayan Networks Corp. (In re Mayan Networks Corp.)*, 306 B.R. 295, 301 (B.A.P. 9th Cir. 2004); *Solow v. PPI Enters., Inc. (In re PPI Enters., Inc.)*, 324 F.3d 197, 210 (3d Cir. 2003).

In *PPI*, a landlord argued that it was entitled under applicable state law to apply funds drawn on a standby letter of credit and received from a third-party to the *disallowed*, rather than the allowed, portion of its claim against the debtor-tenant, thereby leaving a claim against the debtor-tenant in its full, allowable amount, with no credit applied to account for the third-party recovery. 324 F.3d at 209-10. The Third Circuit rejected the argument, holding that it was immaterial whether the funds came from a third-party or from the debtor: "The difference is purely technical [and] . . . insufficient to justify divergent rules as to the respective allowable claims. If the total damages are limited in the one instance, they should likewise be limited in the other instance." *Id.* at 210 (quoting *Oldden v. Tonto Realty Corp.*, 143 F.2d 916, 921 (2d Cir. 1944)). The majority's decision below is entirely consistent with and supported by these decisions, as there is no reason why they should not apply here.

The majority's decision also is consistent with and supported by cases applying 11 U.S.C. §§ 506(b) and 726(a)(5), which allow recovery of post-petition inter-

est where the creditor is oversecured or the debtor is solvent, respectively, in circumstances in which allowance of post-petition interest does not result in administrative inconvenience or unfairness to creditors in contravention of the policies served by section 502(b)(2). Pet. App. 12a (citing cases); *see, e.g., United States v. Alaska Nat'l Bank (In re Walsh Constr., Inc.)*, 669 F.2d 1325, 1330 (9th Cir. 1982); *Gamble*, 44 F.2d at 333. In contrast to those circumstances, as the majority noted below, "allowing, Liberty to collect the additional amount it seeks *will* have an impact on ET Power's creditors: namely, the loss of $17 million from the estate which would otherwise be available for distribution." Pet. App. 12a.

In sum, there is no circuit split concerning the question whether an unsecured claim includes post-petition interest for purposes of section 502(b)(2), and Liberty cites none. Nor could it, as no other circuit court has considered the precise question addressed in the decision below, and courts routinely employ a consistent approach with which the majority's analysis fully comports. The majority's decision also is consistent with and supported by analogous decisions concerning other Code provisions, including other claim-limiting provisions of section 502(b), and this approach too fully comports with the Court's precedents concerning the proper construction of the bankruptcy statutes. Accordingly, Liberty's petition should be denied.

B. The Majority's Decision Does Not Conflict With, And Is Supported By, This Court's Precedents.

1. Federal law governs a creditor's entitlement to post-petition interest on valid pre-petition claims.

The filing of a bankruptcy petition initiates a process that requires some temporal point of demarcation to facilitate the orderly resolution of the debtor's obligations. "The age-old rule in bankruptcy, adopted from the English system, is that interest on claims stops accruing when the bankruptcy petition is filed." *Fesco*, 996 F.2d at 155 (citing *Ron Pair*, 489 U.S. at 246; *Nicholas*, 384 U.S. at 682; *Bruning*, 376 U.S. at 362; *City of New York v. Saper*, 336 U.S. 328, 330 n.7 (1949); *Vanston*, 329 U.S. at 163; *Sexton*, 219 U.S. at 344). *See* H.R. REP. NO. 95-595, at 352-53 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6308-09; S. REP. NO. 95-989, at 62-63 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5848-49.

It is well settled that federal law, not state law, governs a creditor's entitlement to post-petition interest on a valid pre-petition claim. *Vanston*, 329 U.S. at 162-63 ("When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law."); *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994) (operation of the Bankruptcy Code is "unimpeded by contrary state law" where the "meaning of the Bankruptcy Code's text itself is clear") (quotation omitted);

Kellogg v. United States (In re W. Tex. Mktg. Corp.), 54 F.3d 1194, 1196 (5th Cir. 1995) (discussing the validity of creditors' claims for interest and noting that "once the petition is filed, federal law controls"). Accordingly, Liberty's reliance on *Travelers* and similar decisions, *see* Pet. 17-18, is misplaced.

As the Court explained in *Travelers*, "claims enforceable under applicable state law will be allowed in bankruptcy *unless they are expressly disallowed*." 127 S. Ct. at 1206 (emphasis supplied). Whereas no Code provision barred Travelers' unsecured claim for attorneys' fees, section 502(b)(2) expressly bars Liberty from collecting unmatured interest on its unsecured claim. *See also Energy Resources*, 495 U.S. at 549 ("[B]ankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) ("the restructuring of debtor-creditor relations . . . [lies] at the core of the federal bankruptcy power"); *Ashton v. Cameron County Water Improvement Dist. No. One*, 298 U.S. 513, 530 (1936) ("The especial purpose of all bankruptcy legislation is to interfere with the relations between the parties concerned – to change, modify or impair the obligations of their contracts."); *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co.*, 294 U.S. 648, 680 (1935) ("Congress . . . undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however [and] it may operate collaterally or incidentally to impair or destroy the obligation of private contracts.").

The majority's decision neither abrogates a creditor's state-law rights nor rewrites contracts under general principles of equity, but merely holds that a particular creditor's unsecured claim against a particular debtor for post-petition interest must be disallowed under section 502(b)(2) of the Bankruptcy Code. Pet. App. 11a-12a & n.5.

Liberty's assertion that the majority's decision contravenes section 524(e) fails for the same reason. Section 524(e) provides, in relevant part, that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Because GTN's liability to Liberty is unaffected by the bankruptcy proceedings, as the majority explained, the concern regarding section 524(e) is unfounded. Pet. App. 11a n.5. Under the majority's decision, post-petition interest can accrue against a non-debtor, but section 502(b)(2) disallows an unsecured claim for post-petition interest against the bankruptcy estate. *Id.* 11a-13a. GTN's liability to Liberty as a guarantor was contractually capped at $140 million, and this liability has been fully satisfied. *Id.* 3a, 5a.

2. The Court's precedents establish that application of the rule barring unsecured creditors from recovering unmatured interest should be informed by the policy of equality of distribution and equitable principles.

The Court has recognized the importance of history to the construction of bankruptcy statutes.

Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216, 218 (1936). The rule embodied in section 502(b)(2) is deeply ingrained in the Court's jurisprudence. *E.g.*, *Saper*, 336 U.S. at 330-32; *United States v. Marxen*, 307 U.S. 200, 207 (1939); *American Iron & Steel Mfg. v. Seaboard Air Line R. Co.*, 233 U.S. 261, 266 (1914). The Court has stated the central purposes of the rule as ensuring equitable distribution of the estate among competing creditors and avoiding administrative inconvenience. *Nicholas*, 384 U.S. at 682; *Bruning*, 376 U.S. at 362; *Vanston*, 329 U.S. at 166; *Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 411 (1938). The Court also has repeatedly recognized the ancient policy underlying the Bankruptcy Code of equality of distribution among similarly situated creditors under circumstances in which not everyone can be paid in full. *E.g.*, *Begier v. IRS*, 496 U.S. 53, 58 (1990) (noting that "[e]quality of distribution among creditors is a central policy of the Bankruptcy Code"); *see Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 126 S. Ct. 2105, 2116 (2006); *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991); *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945); *Straton v. New*, 283 U.S. 318, 320-21 (1931). The Bankruptcy Code's post-petition rules were described in the legislative materials as codifying "present law." S. REP. NO. 95-989, at 63 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5849.

Vanston leaves no doubt that courts *must* apply the rule barring unsecured creditors from recovering unmatured interest from the estate informed by the

policy of equality of distribution and equitable principles:

> [B]ankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles. And we think an allowance of interest on interest under the circumstances shown by this case would not be in accord with the equitable principles governing bankruptcy distributions.

329 U.S. at 162-63; *see id.* at 164 ("Courts have felt that it would be inequitable for anyone to gain an advantage or suffer a loss because of such delay.") (citing *Sexton*, 219 U.S. at 346); *id.* at 165 (It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor.") (citing *Sexton*, 219 U.S. at 346); *id.* at 166 (explaining that added compensation for creditors or a penalty to induce prompt payment of simple interest would have enriched some creditors at the expense of subordinate creditors and that "[s]uch a result is not consistent with equitable principles"). *See also Howard Delivery*, 126 S. Ct. at 2116 (noting, in rejecting creditor's claim to section 507(a)(5) priority, that "[e]very claim granted priority status reduces the funds available to general unsecured creditors and may diminish the recovery of other claimants qualifying for equal or lesser priorities," and direct-

ing that "[a]ny doubt concerning the appropriate characterization . . . is best resolved in accord with the Bankruptcy Code's equal distribution aim"); *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 451-52 (1937) (upholding section 502(b)(6) predecessor against a constitutional challenge, stating: "The equitable distribution of the bankrupt's assets, or the equitable adjustment of creditors' claims in respect of those assets, by way of reorganization, may . . . be regulated by a bankruptcy law which impairs the obligation of the debtor's contracts. Indeed every Bankruptcy Act avowedly works such impairment.").

Liberty's citations to *United States v. Pollack*, 370 F.2d 79, 80 (2d Cir. 1966), *Darr v. Muratrore*, 8 F.3d 854 (1st Cir. 1993), and *Story v. Livingston*, 38 U.S. 359, 371 (1839), provide no basis for granting Liberty's petition, as none of these cases involve claim-allowance proceedings in bankruptcy or section 502(b)(2). *Vanston*, 329 U.S. at 165 n.9 (distinguishing cases, explaining that "[n]one of them presented to the courts the special bankruptcy problems of uniformity, ratable distribution and fairness and equity which grow out of the context of the bankruptcy law"). Moreover, the liens in *Pollack* belonged to the same creditor and, thus, unlike here, the creditor's decision to apply payment toward interest before principal did not affect competing creditors' rights. 370 F.2d at 80.

In sum, the Court's precedents establish beyond peradventure that the fundamental policies undergirding 502(b)(2) and the Bankruptcy Code are properly considered in determining whether an unsecured

claim includes unmatured interest, and Liberty cites no section 502(b)(2) case to the contrary. Liberty's mischaracterization of the majority's decision notwithstanding, the majority's consideration of equity in determining whether allowance or disallowance of Liberty's claim would serve these policies was hardly an unbridled act of a roving commission invoking general principles of equity unmoored from the statute's text. The majority's decision does not conflict with the Court's precedents applying the proscription against allowing unsecured claims for unmatured interest or concerning construction of the Bankruptcy Code's provisions, and the majority correctly decided the question presented.[5] Liberty's petition should be denied.

C. Certiorari Review Is Premature Because No Other Circuit Court Has Addressed The Application Of Section 502(b)(2) In This Context.

As discussed, there is ample and consistent decisional law addressing whether a particular unsecured claim includes unmatured interest barred by section 502(b)(2); application of third-party recoveries to claims capped by section 502(b)(6); and proper

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[5] Respondents contend that the majority erroneously rejected their argument that Liberty's claim must be reduced by the amount recovered from GTN under applicable state law, *see* Pet. App. 7a-8a, and that a correct application of the governing law independently supports the conclusion reached by the majority in its section 502(b)(2) analysis. Liberty's petition does not rely on this ruling.

interpretation of the Bankruptcy Code's provisions. No other circuit-court decision, however, addresses the precise issue decided below, and Liberty cites no decision that does. The bankruptcy court observed that the question is an issue "of novel impression," Pet. App. 33a, and the panel below issued three opinions. Under the circumstances, further development of the issue in the lower courts is warranted, and Liberty's petition should be denied. *See Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); *Butler v. McKellar*, 494 U.S. 407, 431 n.12 (1990) (Brennan, J., dissenting) (noting the value of "[t]he process of percolation allow[ing] a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule") (alterations in original; internal quotation marks and citation omitted); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari) ("It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.").

D. Liberty's Alleged Circuit Split, Manufactured By Mischaracterizing The Majority's Decision And Invoking Inapposite Code Provisions, Provides No Basis For Certiorari Review.

Liberty's claimed circuit split concerns decisions examining equitable principles underlying the subordination of claims under section 510(c) of the Bankruptcy Code and issues of equitable subordination and disallowance – issues that were neither briefed nor decided below. Any disagreement among the circuits on these issues provides no basis for certiorari review of the decision below.

Section 510(c) allows courts, "under principles of equitable subordination, [to] subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest." 11 U.S.C. § 510(c). It applies where a creditor's claim is legally enforceable and allowable, but the creditor's misconduct warrants an equitable remedy. In such circumstances, courts will subordinate that creditor's claim until other creditors' claims have been satisfied. *See, e.g., Benjamin v. Diamond* (*In re Mobile Steel Corp.*), 563 F.2d 692, 700 (5th Cir. 1977).

Neither section 510(c) nor any of Liberty's cited cases address whether an unsecured claim should be disallowed under section 502(b)(2), and so are inapplicable to the issue presented here. Indeed, Liberty acknowledges that the Debtors have not argued, and that the courts below did not decide, that Liberty's

claim should be subordinated because of Liberty's conduct. Pet. 19.

So too with the cases Liberty cites as evidencing a circuit split concerning whether equitable disallowance requires evidence of creditor misconduct. Pet. 15. The question whether Liberty's claim should be "equitably disallowed" was neither briefed nor decided below and Liberty's cited cases do not address whether an unsecured claim includes unmatured interest for purposes of section 502(b)(2). Although Liberty's cited decisions are silent on the statutory basis for equitable disallowance of claims based on creditor misconduct, it is clear that such authority would have to be grounded in 11 U.S.C. § 502(b)(1) or 11 U.S.C. § 105(a). Under section 502(b)(1), a claim may be disallowed if it would be rendered unenforceable under applicable law due to, *inter alia*, fraudulent, unconscionable, or usurious conduct by a creditor. 4 COLLIER, ¶ 502.03[2][b]; *Kapp v. Naturelle, Inc.* (*In re Kapp*), 611 F.2d 703 (8th Cir. 1979). Because Liberty's cited cases do not involve claims for post-petition interest, their holdings and reasoning are irrelevant to the decision below.

In sum, sections 510(c) and 502(b)(1) concern inapposite issues of how claims should be treated based on a creditor's conduct. Liberty's assertion of a circuit split concerning these issues thus provides no warrant for certiorari review of the decision below. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U. S. 157, 168-69 (2004) ("We ordinarily do not decide in the first instance issues not decided below.") (internal quotation marks and citation omitted).

E. The Petition Presents No Issue of Extraordinary Public Importance Warranting This Court's Intervention.

Liberty and its *Amicus* contend that if the decision below is "left intact, creditors will be unable to predict when their valid state law claims will be allowed in bankruptcy" and that "this uncertainty inevitably will impair the market for commercial credit." Pet. 20-21; Amicus Br. 6. These contentions are unsupported and illogical.

The professed concern that the majority's decision will adversely impact the value of third-party guarantees and the cost of credit in the commercial markets rests on unfounded speculation. The majority *expressly confirmed* Liberty's right to pursue non-debtor guarantor GTN to the full extent of Liberty's state-law rights, and clarified that its decision affects only the amount of Liberty's claim against ET Power, a debtor protected by section 502(b)(2) as well as the primary obligor under the Agreement. Pet. App. 11 n.5. Thus, the argument of Liberty and its *Amicus* is necessarily predicated upon the dubious notion that lenders and others extending unsecured credit take a primary obligor's projected *bankruptcy* distributions into account in deciding whether to lend on the strength of a third-party guarantee. But the whole purpose of such a guarantee is to mitigate the need to rely on the primary obligor's creditworthiness. Accordingly, lenders *without* third-party guarantees likely are more concerned about the creditworthiness of the primary obligor than are lenders holding such guarantees. This would explain why the GTN guar-

antee provided for a reduction in the guarantor's maximum exposure over time as ET Power's expected maximum liability under the Agreement decreased, but did not provide any similar adjustments based upon ET Power's creditworthiness. Pet. App. 31a; JA 28. Liberty apparently obtained the GTN guarantee precisely so that it could rely on GTN's valuable, stable, pipeline assets for its recoveries in the event of a default, rather than on ET Power's creditworthiness.

This is not to deny that lenders with guarantees may take their primary obligor's creditworthiness into account in making lending decisions. But Liberty's argument goes far beyond that proposition. It necessarily suggests that, where the primary obligor files for bankruptcy, the lender, *ex ante*, counts on obtaining a particular distribution from the debtor-obligor's estate as an unsecured creditor. Far more likely is that, for risk-assessment purposes, an unsecured lender's risk of its obligor's bankruptcy equates with that of receiving a zero-dollar recovery on its claim.

That Liberty is contractually barred from recovering additional amounts from non-debtor guarantor GTN is a liability of its own making, and is irrelevant to whether Liberty's unsecured claim is one for unmatured interest proscribed by section 502(b)(2), as the majority below properly recognized. Pet. App. 11a n.5. The majority's decision neither abrogates a creditor's state-law rights against third-party non-debtors nor rewrites contracts under general principles of equity, as Liberty and its *Amicus* contend, but

simply holds that a particular creditor's unsecured claim against a particular bankrupt debtor for post-petition interest must be disallowed under section 502(b)(2). *Id.*

Also unavailing is the contention that the majority' s decision conditions the amount of a creditor's recovery upon the order in which it pursues payment from a debtor and guarantor. Pet. 22; Amicus Br. 7-10. If debtor NEGT had satisfied Liberty's $140 million claim, section 502(b)(2) clearly would have prohibited allocation of any portion of that sum to post-petition interest. With the $140 million principal claim having been paid in full by NEGT, the GTN guarantee would, by its terms, have been satisfied in full, *see* Pet. App. 30a-32a & n.5, and Liberty would have been unable to pursue a claim for post-petition interest against either guarantor. Liberty likewise would have been prevented from seeking additional recovery from ET Power, whose debtor status would protect it from any claim for post-petition interest under section 502(b)(2). Thus, the sequence in which Liberty pursued its claims would not change the amount of the recovery to which it is entitled.

The assertion of Liberty's *Amicus* that the majority's decision confers a "windfall on the guarantor at the creditor's expense" with no countervailing benefit to the estate, *see* Amicus Br. 10-12, also is incorrect. GTN cannot assert a reimbursement claim against ET Power because the GTN sale agreements provided that GTN's liability to Liberty would be paid directly from the escrow, *see* Pet. App. 5a, 28a & n.3, and any remaining balance to NEGT, *see* JA 174.

GTN thus was fully protected under its guarantee by the escrow funds, and debtor NEGT, rather than non-debtor GTN, is the entity holding potential subrogation or reimbursement claims against ET Power on account of the $140 million payment to Liberty.

If NEGT sought subrogation to Liberty's claim as a co-obligor, the claim would be subordinated to the extent of any distributions to which Liberty is entitled. 11 U.S.C. §§ 509(a), (c). Accordingly, any distributions to Liberty from ET Power would diminish NEGT's recovery from ET Power, and NEGT's creditors would bear the burden of Liberty's claim for post-petition interest. On the other hand, if NEGT asserted, in lieu of subrogation, an indemnification claim against ET Power under 11 U.S.C. §§ 502(e)(2), that claim would be subordinated to Liberty's claim until Liberty's claim is "paid in full, either through payments [under the Bankruptcy Code] or otherwise." 11 U.S.C. § 509(c).[6] Once it receives its distribution from ET Power, Liberty will have been paid in full, and, accordingly, NEGT's reimbursement claim would no longer be subordinated. NEGT may then take the position that it should be allowed to assert (and receive distributions on) its entire claim of $140 million, without limitation.

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[6] *See* 4 COLLIER ¶ 509.02[3] ("If the codebtor has paid the original claimant, the codebtor has a choice of whether to proceed as a claimant under section 502(e)(2) or to seek a right of subrogation under section 509.").

The outcome of this potential inter-debtor dispute, which was rendered moot by the decision below, is, in any event, not relevant to Liberty's petition. If Liberty were to receive any additional distributions, the *only* possible source for such recovery would be NEGT and/or ET Power. Accordingly, at least one of the Debtors' estates, and thus, other creditors, would bear the burden of Liberty's claim for post-petition interest.

Liberty's petition thus fails to demonstrate the existence of an issue of extraordinary public importance requiring this Court's intervention. The only interest at stake here is Liberty's interest in increasing its *pro rata* share of the Debtors' estates at the expense of other creditors. This Court's intervention is unwarranted and the petition should be denied. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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